# SUPREME COURT OF THE UNITED STATES

No. 97–873

UNITED STATES, PETITIONER *v.* ALOYZAS BALSYS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[June 25, 1998]

JUSTICE BREYER, with whom JUSTICE GINSBURG joins, dissenting.

Were Aloyzas Balsys to face even a theoretical possibility that his testimony could lead a State to prosecute him for murder, the Fifth Amendment would prohibit the Federal Government from compelling that testimony. The Court concludes, however, that the Fifth Amendment does not prohibit compulsion here because Balsys faces a real and substantial danger of prosecution not, say, by California, but by a foreign nation. The Fifth Amendment, however, provides that "[n]o person . . . shall be compelled in *any* criminal case to be a witness against himself." U. S. Const., Amdt. 5 (emphasis added). This Court has not read the words "any criminal case" to limit application of the Clause to only *federal* criminal cases. See *Murphy* v. *Waterfront Comm'n of N. Y. Harbor*, 378 U. S. 52 (1964). That precedent, as well as the basic principles underlying the privilege, convince me that the Fifth Amendment's privilege against self-incrimination should encompass, not only feared domestic prosecutions, but also feared foreign prosecutions where the danger of an actual foreign prosecution is substantial.

I

I begin with a point which focuses upon precedent set-

ting forth the current understanding of the scope of the word "any," and which reveals the basic difference between the majority's view of the privilege and the view this Court has previously taken and should continue to take. The majority focuses upon one case, *Murphy* v. *Waterfront Comm'n of N. Y. Harbor*, *supra*, which itself discusses much historically relevant precedent. And the majority's focus upon that one case is appropriate.

*Murphy* holds that "the constitutional privilege against self-incrimination protects . . . a federal witness against incrimination under state . . . law." *Id.*, at 77–78. As I read *Murphy*, the Court thought this conclusion flowed naturally from its basic understanding of the scope of the Fifth Amendment privilege. On that understanding, the privilege prohibits federal courts (and state courts through the Fourteenth Amendment) from compelling a witness to furnish testimonial evidence that may be used to prove his guilt *if that witness may reasonably fear criminal prosecution*. See *id.*, at 60–63 (discussing the English cases, *King of Two Sicilies* v. *Willcox*, 1 Sim. (N.S.) 301, 61 Eng. Rep. 116 (Ch. 1851), and *United States* v. *McRae*, 3 L.R. Ch. 79 (1867), as ones that, if rightly understood, embody that proposition of law).

The privilege, understood in this way, requires the abolition of any "same sovereign" rule. It is often reasonable for a federal witness to fear state prosecution, and vice versa. Indeed, where testimony may incriminate and immunity has not been granted, it is so reasonable, that one can say, as a matter of law, that the privilege applies, across jurisdictions, to the entire class of cases involving federal witnesses who fear state prosecutions and also to the entire class of cases involving state witnesses who fear federal prosecutions. See *Murphy*, *supra*, at 77–78. Thus, the Fifth Amendment (or the Fourteenth Amendment) automatically prohibits compelled testimony in any such cross-jurisdictional circumstance.

If I am right about how *Murphy* should be understood, then that case directs the application of the privilege in this one. That is because the only difference between *Murphy* and this case is that one cannot say, as a matter of law, that *every* threat of a foreign prosecution is a reasonable threat. But where there is such a reasonable threat– where the threat is "real and substantial," *Zicarelli* v. *New Jersey State Comm'n of Investigation*, 406 U. S. 472, 478 (1972)– the privilege, as *Murphy* understands it, would apply.

A

The majority says that one can read *Murphy* as embodying a very different rationale, a rationale that turns upon considerations of federalism– the need to consider "state and federal jurisdictions . . . as one" for purposes of applying the privilege. *Ante*, at 15. It reads *Murphy* as a case that sees at the heart of the Clause

> "the principle that the courts of a government *from which* a witness may reasonably fear prosecution may not in fairness compel the witness to furnish testimonial evidence that may be used to prove his guilt." *Ibid.* (emphasis added).

I have underscored the key words "from which." It is these words that tie the clause to prosecutions by the same sovereign.

But what is the evidence that *Murphy* put any legal weight at all upon those underscored words? What reason has the majority to believe that *Murphy* subscribes to, or depends in any way upon, this phrasing of the privilege's "principle" rather than upon the critically different "principle" I suggested above, *i.e.*, the principle that "courts may not in fairness compel a witness who reasonably fears prosecution to furnish testimony that may be used to prove his guilt?"

The majority points to two relevant *Murphy* statements.

In the first, *Murphy* said that *Malloy* v. *Hogan*, 378 U. S. 1 (1964), which incorporated the Fifth Amendment privilege as part of the Fourteenth Amendment's Due Process Clause, "necessitates a reconsideration" of *United States* v. *Murdock*, 284 U. S. 141 (1931), which had held that the Fifth Amendment protected an individual only from prosecutions by the Federal Government. *Murphy*, 378 U. S., at 57. In the second, *Murphy* mentioned, as one of many items of support for its analysis, that most Fifth Amendment policies are defeated

> "when a witness 'can be whipsawed into incriminating himself under both state and federal law even though' the constitutional privilege against self-incrimination is applicable to each." *Id.*, at 55 (quoting *Knapp* v. *Schweitzer*, 357 U. S. 371, 385 (1958) (Black, J., dissenting)).

Since the first statement mentions only a reason for reconsidering *Murdock*, since the second offers support on either analysis, and since neither refers to any "alternative rational[e]" for decision, *ante*, at 13, the majority's evidence for its reinterpretation of *Murphy* seems rather skimpy.

Now consider the reasons for believing that *Murphy* rests upon a different rationale— a rationale that, by focusing upon the basic nature and history of the underlying right, rejects *Murdock*'s "same sovereign" rule. First, *Murphy* holds that the "constitutional privilege" itself, not that privilege together with principles of federalism, "protects . . . a federal witness against incrimination under state . . . law." *Murphy*, *supra*, at 78. Second, it says explicitly that it "reject[s]" the *Murdock* rule, not because of considerations of federalism arising out of *Malloy*, but because it is "unsupported by history or policy" and represents a "deviation" from a "correct . . . construction" of the privilege in light of its "history, policies and purposes."

*Murphy*, *supra*, at 77. Third, about half of the opinion consists of an effort to demonstrate that the privilege, as understood by the English courts and by American courts prior to *Murdock*, protected individuals from compelled testimony in the face of a realistic threat of prosecution by *any* sovereign, not simply by the same sovereign that compelled the testimony. See *Murphy*, 378 U. S., at 58–70. Fourth, the rest of the Court's analysis consists of a discussion of the purposes of the privilege, which purposes, in the Court's view, lead to a similar conclusion. See *id.*, at 55–56. Fifth, the Court explicitly rejects the analysis of commentators who argued for a "same sovereign" rule on the ground that their understanding of the privilege's purposes was incomplete. See *id.*, at 56–57, n. 5 (rejecting 8 J. Wigmore, Evidence §2258, p. 345 (McNaughton rev. 1961). Sixth, the Court nowhere describes its rationale in "silver platter" or similar terms that could lead one to conclude that its rule is prophylactic, enforcement-based, or rests upon any rationale other than that the privilege is not limited to protection against prosecution by the same jurisdiction that compels the testimony. Cf. 378 U. S., at 80–81 (Harlan, J., concurring in judgment).

Consequently, I believe one must read *Murphy* as standing for the proposition that the privilege includes protection against being compelled to testify by the Federal Government where that testimony might be used in a criminal prosecution conducted by another sovereign. And the question the Court must consequently face is whether we should reject the rationale of that case when we answer the question presented here. In other words, we must ask not, "what did *Murphy* hold," but "was *Murphy* right?"

B

Since *Murphy* is prevailing law, the majority bears the burden of showing that *Murphy* is wrong; and the majority

says that *Murphy*'s reasoning is "fatally flawed" and legally "[un]sound." *Ante*, at 17, 20. But it is not. *Murphy*'s reasoning finds in *Malloy*'s holding (that the privilege binds the States) a need to re-examine the "same sovereign" rule, first set forth in the earlier case of *Murdock*. Without re-examination, *Murdock*'s rule would have permitted State and Federal Governments each to have compelled testimony for use by the other. *Murphy*'s reasoning then finds the "same sovereign" rule unsound as a matter of history and of the basic purposes of the privilege.

*Murphy*'s use of legal history is traditional. It notes that *Murdock* rested its own conclusion upon earlier English and American cases. It reads the language of those cases in light of the reasons that underlie it. It says that, so read, those cases did not stand for a "same sovereign" rule, but suggested the contrary. And it concludes that *Murdock*'s legal pedigree is suspicious or illegitimate. In a word, *Murphy* examines *Murdock*'s historical pedigree very much the way that the majority today analyzes that of *Murphy*. The difference, however, is that *Murphy* makes a better case for overturning its predecessor than does the majority.

I can reiterate the essence of *Murphy*'s analysis, amending it to fit the present case, roughly as follows:

> 1. *Murdock* thought that English law embodied a "same sovereign" rule, but it did not. Two early English cases, one decided in 1749 and the other in 1750, held that the privilege applied even though the feared prosecution was, in the one case, in Calcutta, and in the other, by ecclesiastical authorities. *East India Co.* v. *Campbell*, 1 Ves. sen. 246, 27 Eng. Rep. 1010 (Ex. 1749); *Brownsword* v. *Edwards*, 2 Ves. sen. 243, 28 Eng. Rep 157 (Ch. 1750). Those cases said nothing about whether or not the law of Calcutta, Church law, and English law all emanate from a single sovereign. But *Murdock* had cited a famous later English case,

*King of the Two Sicilies* v. *Willcox*, 1 Sim. (N. S.) 301, 61 Eng. Rep. 116 (Ch. 1851), as standing for the "same sovereign" principle.

It is true that one of the English judges in that case, Lord Cranworth, said that the privilege involves only "matters [made] penal by [English] . . . law." *Id.*, at 329, 61 Eng. Rep., at 128. But Lord Cranworth immediately qualified that conclusion by restating the conclusion in terms of its rationale, namely that the privilege applies "to matters as to which, if disclosed, the Judge would be able to say, as matter of law, whether it could or could not entail penal consequences." *Ibid.* And, 16 years later, the English courts sustained a claim of privilege involving a threatened forfeiture in America. *United States* v. *McRae*, 3 L.R. Ch. 79 (1867). In doing so, the *McRae* court said both that Lord Cranworth's statement in *King of the Two Sicilies* "la[id] down . . . a proposition" that was "broad[er]" than necessary to "support the judgment," and that the true reason the privilege had not applied in the earlier case was because the judge did not "know . . . with certainty . . . the [foreign law, hence] whether the acts . . . had rendered [the defendants] amenable to punishment" and "it was doubtful whether the Defendants would ever be within the reach of a prosecution, and their being so depended on their voluntary return to [Sicily]." *United States* v. *McRae*, *supra*, at 85, 87.

Thus, the true English rule as of the time of *Murdock*, insofar as any of these cases reveal that rule, was not a "same sovereign" rule, but a rule that the privilege did not apply to prosecutions by another sovereign *where the danger of any such prosecution was speculative or insubstantial*. Cf. *Queen* v. *Boyes*, 1 B. & S. 311, 330, 121 Eng. Rep. 730, 738 (Q. B. 1861) ("[T]he danger to be apprehended must be real and

appreciable . . . not a danger of an imaginary and unsubstantial character").

Where is *Murphy*'s error?

2. *Murdock* thought that earlier American cases required a "same sovereign" rule, but they did not. To the contrary: Chief Justice Marshall, in the *Saline Bank* case, wrote that "a party is not bound to make any discovery which would expose him to penalties." *United States* v. *Saline Bank of Va.*, 1 Pet. 100, 104 (1828). Justice Holmes later cited this case as authority for the proposition that the Fifth Amendment privilege "exonerated" a federal witness "from [making] disclosures which would have exposed him to the penalties of the state law." *Ballman* v. *Fagin*, 200 U. S. 186, 195 (1906). Lower federal courts, consistent with the English rule, had held that a witness could refuse to answer questions based on the danger of incrimination in another jurisdiction. See, *e.g.*, *In re Hess*, 134 F. 109, 112 (ED Pa. 1905); *In re Graham*, 10 Fed. Cas. 913, 914 (No. 5,659) (SDNY 1876). True, the Court had written in dicta that "[w]e think the legal immunity is in regard to a prosecution in the same jurisdiction, and when that is fully given it is enough." *Jack* v. *Kansas*, 199 U. S. 372, 382 (1905). But that unexplained dicta, which a later case linked to a (misunderstood) English rule, see *Hale* v. *Henkel*, 201 U. S. 43, 68–69 (1906), provides an insufficient historical basis for *Murdock*'s summary conclusion, particularly since the Court, immediately prior to *Murdock*, had indicated that the question remained open. See *Vajtauer* v. *Commissioner of Immigration*, 273 U. S. 103 (1927) (reserving question; citing *Saline Bank* and *Ballman* v. *Fagin*).

Again, where is *Murphy*'s error?

Stated in this minimal way, *Murphy*'s historical analysis

is difficult to attack. One can, of course, always point to special features of a case and thereby distinguish it. In respect to the mid-18th century English cases, one can point out that Calcutta and the Church may not have been completely separate "sovereigns." *Ante*, at 17–18. And *Saline Bank* might have involved application by the federal court of a state law that, without the help of the Fifth Amendment, protected a party from self-incrimination. But see *Saline Bank*, *supra*, at 103 (citing Virginia privilege statute which, by its terms, applied to suit by the *state* "Attorney General" in the *state* "Superior Court of Chancery for the district of Richmond" for recovery of a bank's capital stock "in behalf of the Commonwealth"). But this kind of criticism is beside the point. The English judges made no point of the former. See *ante*, at 16 (statements about the privilege in these cases were "unqualified"). It does not denigrate their learning to suggest that they did not articulate the precise sovereignty-related status of ecclesiastical courts or of Calcutta's criminal law in 1749. Nor did Justice Holmes make any point of the latter. See *Ballman* v. *Fagin*, *supra*, at 195. As for the suggestion that it is illegitimate to consider the later English authorities in construing the privilege, see *ante*, at 19, one would think that, on this view, *Murdock* is at least as vulnerable as *Murphy*.

Most importantly, neither the majority today, nor the authorities it cites, see *ante* at 21–22, n.11, shows that the key historical points upon which *Murphy* relied are clearly wrong. At worst, *Murphy* represents one possible reading of a history that is itself unclear. *Murphy*'s main criticisms of *Murdock* are reasonable ones. Its reading of earlier cases, in so far as they were relevant to its criticism of *Murdock*, was plausible then, see Grant, Federalism and Self-Incrimination, 4 UCLA L. Rev. 549, 562 (1957) (*Murdock* "illustrates the danger of copying one's precedents directly from the brief of counsel"); and it is plausible now.

That minimalist conclusion is sufficient for present purposes. Even if *Murdock*'s 3-sentence, and *Murphy*'s 20-page, historical analyses were equally plausible, we would need something more to abandon *Murphy*, for it is the most recent, and thereby governing, precedent.

Nor can I find any other reason for rejecting *Murphy* and, thereby, resurrecting *Murdock*. The Fifth Amendment's language permits *Murphy*'s construction, for it says "any criminal case." The history of the Amendment's enactment simply does not answer the question about whether or not it applied where there is a substantial danger of prosecution in another jurisdiction. See *United States* v. *Gecas*, 120 F. 3d 1419, 1435 (CA11 1997) (en banc) (Fifth Amendment privilege "has virtually no legislative history"); Moglen, Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination, 92 Mich. L. Rev. 1086, 1123 (1994) (Fifth Amendment's legislative history "adds little to our understanding of the history of the privilege"). It is possible that the language, "in any criminal case," was aimed at limiting protection to compelled testimony against *penal* interests, a reading consistent with the Court's contemporary understanding of the Clause. See, *e.g.*, *United States* v. *Ward*, 448 U. S. 242, 248–255 (1980) (rejecting claim to privilege based on fear of civil penalty, in part, because Clause "is expressly limited to 'any criminal case'"); 5 The Founders' Constitution 262 (P. Kurland & R. Lerner eds. 1987) (indicating that phrase "in any criminal case" was proposed by Representative Lawrence to ensure that the Clause was not "in some degree contrary to laws passed"). And it is also possible that the language was intended to limit the proceedings in which the privilege could be *claimed* to criminal cases, which understanding the Court rejected long ago. See *McCarthy* v. *Arndstein*, 266 U. S 34, 40 (1924) (The privilege "applies alike to civil and criminal proceedings, wherever the answer might tend to subject to

criminal responsibility him who gives it"). Neither of these readings is any *more* speculative, as a textual or historical matter, than reading the Clause as the majority does, against its text, to restrict the universe of feared prosecutions *upon which basis* the privilege may be asserted.

What is more, there is no suggestion that *Murphy*'s rule, applied to state and federal prosecutions, "has proven intolerable simply in defying practical workability." *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 854 (1992) (citing *Swift & Co.* v. *Wickham*, 382 U. S. 111, 116 (1965)). Nor have the facts, or related principles of law, subsequently changed so much "as to have robbed the old rule of significant application or justification." *Id.*, at 855 (citing *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 173–174 (1989), and *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 412 (1932) (Brandeis, J., dissenting)). Indeed, it was the *Murdock* rule's legitimacy that, prior to *Murphy*, consistently divided the Court. See, *e.g.*, *Irvine* v. *California*, 347 U. S. 128, 139–142 (1954) (Black, J., joined by Douglas, J., dissenting) ("I cannot agree that the [Fifth] Amendment's guarantee against self-incrimination testimony can be spirited away by the ingenious contrivance of using federally extorted confessions to convict of state crimes and vice versa"); *Feldman* v. *United States*, 322 U. S. 487, 494–503 (1944) (Black, J., joined by Douglas and Rutledge, JJ., dissenting).

The conclusion that I draw is that the rationale established through *Murphy*'s precedent governs. That rationale interprets the privilege as applicable at the least where a person faces a substantial threat of prosecution in another jurisdiction. And that reading of the privilege favors Balsys here.

II

Precedent aside, I still disagree with the Court's conclusion. As *Murphy* said, and as the Second Circuit reiterated, the Fifth Amendment reflects, not one, but several different purposes. *Murphy*, 378 U. S., at 55; 119 F. 3d 122, 129 (CA2 1997). And whatever the disagreement about the relative weight to be given each of those purposes or their historical origins, I believe that these purposes argue in favor of the Second Circuit's interpretation. Namely, an interpretation that finds the Fifth Amendment privilege applicable where the threat of a foreign prosecution is "real and substantial," as it is here. See *United States* v. *McRae*, 3 L.R. Ch., at 85–87 (distinguishing *King of the Two Sicilies*, 1 Sim. (N.S.) 301, 61 Eng. Rep. 116 (Ch. 1851), on this ground); cf. *Queen* v. *Boyes*, 1 B. & S., at 330, 121 Eng. Rep., at 738.

A

This Court has often found, for example, that the privilege recognizes the unseemliness, the insult to human dignity, created when a person must convict himself out of his own mouth. "At its core, the privilege reflects 'our fierce unwillingness to subject those suspected of crime to the cruel [choice] of self-accusation, perjury or contempt.'" *Pennsylvania* v. *Muniz*, 496 U. S. 582, 596 (1990) (quoting *Doe* v. *United States*, 487 U. S. 201, 212 (1988)); *South Dakota* v. *Neville*, 459 U. S. 553, 563 (1983). The privilege can reflect this value, and help protect against this indignity, even if other considerations produce only partial protection– protection that can be overcome by other needs. Cf. MacNair, The Early Development of the Privilege Against Self-Incrimination, 10 Oxford J. Legal Studies 66, 70 (1990) (early ecclesiastical procedure recognized privilege until an accusation was made that person had committed an offense); *ante*, at 24–25 (observing that the "protection of personal inviolability" is not a "reliable guid[e]"

to the "actual scope of protection under the Clause"). And that value is no less at stake where a foreign, but not a domestic, prosecution is at issue.

This Court has also said that the privilege serves to protect personal privacy, by discouraging prosecution for crimes of thought. See *Muniz*, *supra*, at 595–596 (describing English Star Chamber "wherein suspects were forced to choose between revealing incriminating private thoughts and forsaking their oath by committing perjury"); *United States* v. *Nobles*, 422 U. S. 225, 233 (1975) ("The Fifth Amendment privilege . . . protects 'a private inner sanctum of individual feeling and thought and proscribes state intrusion to extract self-condemnation'" (quoting *Couch* v. *United States*, 409 U. S 322, 327 (1973)). Indeed, some have argued that the Puritans championed the privilege because, had the 17th century state questioned them about their beliefs, they would have had to answer truthfully and thus suffer condemnation. See L. Levy, Origins of the Fifth Amendment 134 (1968) ("If [a Puritan] took the oath and lied, he committed the unpardonable and cardinal sin of perjury which was simply not an option for a religious man"). This consideration may prove less important today domestically, for the First Amendment protects against the prosecution of thought crime. But that fact also provides no reason for denying protection where the prosecution is foreign.

The Court has said that the privilege reflects, too, "our fear that self-incriminating statements will be elicited by inhumane treatment and abuses." *Murphy*, *supra*, at 55. This concern with governmental "overreaching" would appear implicated as much when the foreseen prosecution is by another country as when it is by another domestic jurisdiction. Indeed, the analogy to *Murphy*'s observation about "cooperative federalism," in which state and federal governments wage "a united front against many types of criminal activity," *id.*, at 56, is a powerful one. That is

because, in the 30 years since *Murphy*, the United States has dramatically increased its level of cooperation with foreign governments to combat crime. See generally E. Nadelman, Cops Across Borders: The Internationalization of U. S. Criminal Law Enforcement (1993); Bassiouni, Policy Considerations on Inter-State Cooperation in Criminal Matters, 4 Pace Y.B. Int'l L. 123 (1992); Zagaris, International Criminal and Enforcement Cooperation in the Americas in the Wake of Integration, 3 Sw. J. L. & Trade Am. 1 (1996). The United States has entered into some 20 "mutual legal assistance treaties" through which it may develop and share evidence with foreign governments in order to facilitate criminal prosecutions abroad, see *New MLAT Treaties Increase DOJ's Reach*, 4 No. 7 DOJ Alert 7 (Apr. 18, 1994) (listing and discussing treaties); it has signed more than 50 new extradition agreements, see 18 U. S. C. §3181 (1994 ed., Supp. II) (listing extradition treaties ratified since 1960); Nadelman, Cops Across Borders, at 489–502 (same); it has increased by an order of magnitude the number of law enforcement offices and personnel located abroad, see *id.*, at 479–486 (cataloging growth in foreign-based law enforcement personnel since 1965); and it has established a special office "'for the purpose of centralizing and giving greater emphasis and visibility to [the Justice Department's] prosecutorial service functions in the international arena,'" which office has led to a "dramatic increase in the number of extraditions" and an "even greater growth in the numbers of requests for evidence in criminal cases" since the 1970's, *id.*, at 402 (discussing DOJ's Office of International Affairs) (alterations omitted).

Indeed, the United States has a significant stake in the foreign prosecution at issue here. Congress has passed a deportation law targeted at suspected Nazi war criminals. See 8 U. S. C. §1182(a)(3)(E). The Justice Department has established an agency whose mandate includes the assis-

tance of foreign governments in the prosecution of those deported. See App. 15–17 (Order No. 851–79, establishing DOJ's Office of Special Investigations). And the United States has agreed with Lithuania (where Balsys may stand trial) "to cooperate in prosecution of persons who are alleged to have committed war crimes . . . [and] to provide . . . legal assistance concerning [such] prosecution[s]." Memorandum of Understanding Between United States Department of Justice and Office of Procurator General of the Republic of Lithuania Concerning Cooperation in the Pursuit of War Criminals, Aug. 3, 1992, App. in No. 96–6144 (CA2), p. 395. As the Second Circuit reasoned, since the Federal Government now has a stake in many foreign prosecutions akin to its stake in state prosecutions, a stake illustrated by this case, the privilege's purpose of preventing governmental overreaching is served by recognizing the privilege in the former class of cases, just as it is served in the cases of "cooperative federalism" identified by *Murphy*. Indeed, experience suggests that the possibility of governmental abuses in cases like this one– where the United States has an admittedly keen interest in the later, foreign prosecution– is not totally speculative. See, *e.g.*, *Demjanjuk* v. *Petrovsky*, 10 F. 3d 338 (CA6 1993).

An additional purpose served by the privilege is "our preference for an accusatorial rather than an inquisitorial system of criminal justice." *Murphy*, 378 U. S., at 55. Even if this systemic value speaks to "domestic arrangements" only, *ante*, at 24, the investigation of crime is as much a part of our "system" of criminal justice as is any later criminal prosecution. Reflecting this fact, the Court has said that the Fifth Amendment affords individuals protection during the investigation, as well as the trial, of a crime. See *Miranda* v. *Arizona*, 384 U. S. 436 (1966). And the importance we place in our system of criminal investigation, and the distaste we have for its alternatives, would stand diminished if an accused were denied the

Fifth Amendment's protections because the criminal case against him, though built in this country by our Government, was ultimately to be prosecuted in another. This is true regardless of whether the "Bill of Rights was intended to have any effect on the conduct of foreign proceedings." *Ante*, at 1 (STEVENS, J., concurring). The Fifth Amendment undeniably "prescribes a rule of conduct for our Nation's officialdom," *ante*, at 1 (GINSBURG, J., dissenting), and it is that conduct, not a foreign proceeding, which is at issue here.

B

If the policies and purposes which this Court has said underlie the Fifth Amendment– respect for individual dignity and privacy, prevention of governmental overreaching, preservation of an accusatorial system of criminal justice– would all be well served by applying the privilege when a witness legitimately fears foreign prosecution, then what reason could there be for reinterpreting the privilege so as not to recognize it here?

Two reasons have been suggested: First, one might see a government's compulsion of testimony followed by its own use of that testimony in a criminal prosecution as somewhat more unfair than compulsion by one government and use by another. And one might also find the States and the Federal Government so closely interconnected that the unfairness is further diminished where the prosecuting sovereign is a foreign country.

But this factor, in my view, cannot be determinative. For one thing, this issue of fairness is a matter of degree, not kind. For another, changes in transportation and communication have made relationships among nations ever closer, to the point where cooperation among international prosecutors and police forces may be as great today as among the States (or between the States and the Federal Government) a half-century ago. See *supra*, at 12–13

(discussing rise in international cooperation). Finally, this Court's cases suggest that the remaining considerations– particularly the inherent indignity and cruelty to the individual in compelling self-incrimination– bulk larger in terms of the basic values that the Fifth Amendment reflects than does this single, partial, fairness consideration. See *supra*, at 11–12 (citing cases). I cannot agree that this particular feature– the fact that prosecution by a different sovereign seems not quite as unfair as prosecution by the same sovereign– could warrant denying the privilege's application.

The second consideration is practical. The majority, as well as the Government, fear that application of the privilege might unreasonably interfere with the work of law enforcement. See *ante*, at 31; Brief for United States 30–36. But in my view, that fear is overstated. After all, "foreign application" of the privilege would matter only in a case where an individual could not be prosecuted domestically but the threat of foreign prosecution is substantial Cf. *Zicarelli*, 406 U. S., at 478–481 (declining to reach privilege claim because witness did not face "real danger" of foreign prosecution). The Second Circuit points out that there have only been a handful of such cases. 119 F. 3d, at 135 (finding only six cases in the 25 years since *Zicarelli*). That is because relatively few witnesses face deportation or extradition, and a witness who will not "'be forced to enter a country disposed to prosecute him,'" 119 F. 3d, at 135 (quoting *United States* v. *Gecas*, 50 F. 3d 1549, 1560 (CA11 1995), cannot make the showing of "real and substantial" fear that *Zicarelli* would require.

Moreover, even where a substantial likelihood of foreign prosecution can be shown, the Government would only be deprived of testimony that relates to the foreign crime; the witness would not be entitled to claim a general silence. See *Hoffman* v. *United States*, 341 U. S. 479, 486 (1951) (witness may only refuse to answer questions that might

"in themselves support a conviction" or "furnish a link in the chain of evidence" for such crime). And nothing would prevent the Government, in a civil proceeding, from arguing that an adverse inference should be drawn from the witnesses silence on particular questions, see *Baxter* v. *Palmigiano*, 425 U. S. 308, 318 (1976), or from supporting that inference with evidence from other, nonprivileged sources. Thus, without any adjustment in practice, it would seem that the Government would lose little information, and even fewer cases, were the privilege recognized here.

In those rare instances where the need for testimony was sufficiently great, a grant of *de facto* "immunity" remains a possibility. The Government need only take steps sufficient to make the threat of foreign prosecution insubstantial. Thus, a promise by the United States that deportation will not take place, or that deportation to a different country will ensue, would seem sufficient. A further promise by the foreign nation that prosecution will not take place, or will not make use of the elicited testimony, will obviate the need even for such a deportation promise. And were a foreign sovereign to later seek extradition of the witness, the Government, under existing law, might retain the discretion to decline such a request. See 18 U. S. C. §3186 ("Secretary of State *may* order" extraditable person "delivered to . . . foreign government"); §3196 (giving Secretary of State discretion whether to extradite U. S citizens provided treaty does not obligate her to do so).

I do not want to minimize the potential difficulties inherent in providing this kind of "immunity." It might require a change in domestic law, or in a given case, an adjustment in an understanding reached with a foreign government. In unusual circumstances, as JUSTICE STEVENS recognizes, see *ante* at 2, it might require adjusting the legal rules that express the privilege in order to prevent a foreign government's efforts to stop its citi-

zens from testifying in American courts. But I do not see these difficulties as creating overwhelming obstacles to the legitimate application of the privilege in instances such as the one present here. Nor do I see these difficulties as significantly greater than those that inhere in the ordinary grant of immunity, which also requires legislation, and which also can create friction among competing jurisdictions. At worst, granting *de facto* "immunity" in this type of case would mean more potentially deportable criminal aliens will remain in the United States, just as today's immunity means more potentially imprisonable citizens remain at liberty. This is a price that the Amendment extracts where government wishes to compel incriminating testimony; and it is difficult to see why that price should not be paid where there is a real threat of prosecution, but it is foreign.

* * *

In sum, I see no reason why the Court should resurrect the pale shadow of *Murdock*'s "same sovereign" rule, a rule that *Murphy* demonstrated was without strong historical foundation and that would serve no more valid a purpose in today's world than it did during *Murphy*'s time. *Murphy* supports recognizing the privilege where there is a real and substantial threat of prosecution by a foreign government. Balsys is among the few to have satisfied this threshold. The basic values which this Court has said underlie the Fifth Amendment's protections are each diminished if the privilege may not be claimed here. And surmountable practical concerns should not stand in the way of constitutional principle.

For these and related reasons elaborated by the Second Circuit, I respectfully dissent.